Supreme Court, U.S.
FILED
DEC 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

85 - 1088

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

ALAN WOODS AND CARA WOODS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER SECTION 12-22-72 OF THE *CODE OF ALABAMA* (1975) WHICH IMPOSES A MANDATORY PENALTY OF TEN PERCENT OF THE AMOUNT OF JUDGMENT ON AN UNSUCCESSFUL DEFENDANT-APPELLANT WHILE IMPOSING NO SIMILAR PENALTY ON PLAINTIFF-APPELLANTS IS UNCONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT.

II. WHETHER THE STATUTORY AFFIRMANCE PENALTY IS A RULE OF PROCEDURE WHICH IS NOT APPLICABLE TO FEDERAL ACTIONS.

PARTIES TO THE PROCEEDING

Parties:

Alan Woods
Cara Woods
Burlington Northern Railroad Company

Affiliated or Related Parties:

The parent company to Burlington Northern Railroad Company is Burlington Northern, Inc., which owns all the stock in Burlington Northern Railroad Company. The following companies are affiliated with the Burlington Northern Railroad Company:

The Belt Railway of Chicago
The Camas-Prairie Railroad Company
Davenport, Rock Island & Northwestern Railway Company
Denver Union Terminal Railway Company
Galveston Terminal Railway Company
Houston Belt and Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
The Lake Superior Terminal Transfer Railway Company
Longview Switching Company
Minnesota Transfer Railway Company
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Pueblo Terminal Union Depot and Railroad Company
St. Paul Union Depot Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Wichita Union Terminal Railway Company
Winona Bridge Company

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The order of the United States Court of Appeals, Eleventh Circuit granting appellees' motion for ten percent penalty assessment pursuant to Alabama statute is unreported but is attached hereto as Appendix A. The issue could not be raised at the trial level.

JURISDICTION

The order of the United States Court of Appeals, Eleventh Circuit granting the ten percent statutory affirmance penalty was entered on September 19, 1985 (Appendix A). Petitioner has ninety days to file its Petition for Writ of Certiorari with this Court. 28 U.S.C. § 2101(c). Therefore this Petition is time-

ly filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The first question presented involves the constitutionality of a statutory affirmance penalty imposed on defendant-appellants who file unsuccessful appeals in Alabama. The second question concerns the applicability of that statutory penalty to diversity actions brought in federal court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment XIV, Section 1.

* * * * *

Interest

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefore may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States courts shall distribute notice of that rate and any changes in it to all Federal judges.

28 U.S.C. § 1961(a).

* * * * *

Affirmation of stayed judgment—generally.

When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 per cent damages thereon and the costs of the appellate court; and, upon the appeal of any judgment or decree entered or rendered for any amount of commissions, fees or compensation fixed or determined by the trial court and taxed or allowed as costs, if the appellate court affirms the judgment or decree of the court below and the payment thereof has been stayed on such appeal, judgment shall be entered by the appellate court against all or any of the obligors on the bond for the amount affirmed, 10 per cent damages thereon and the costs of the appellate court; provided, however, that if no supersedeas bond has been executed on such appeal, the appellate court, in the event of affirmance, shall increase the amount so allowed as costs in the court below in the judgment or decree appealed from by adding thereto 10 percent damages thereon and the costs of the appellate court.

Section 12-22-72, *Code of Alabama* (1975).

* * * * *

Interest on money judgments and costs.

Judgments for the payment of money, other than costs, if based upon a contract action, bear interest from the day of the cause of action, at the same rate of interest as stated in said contract; all other judgments shall bear interest at the rate of 12 percent per annum, the provisions of Section 8-8-1 to the contrary notwithstanding, provided, that fees

allowed as trustee, executor, administrator or attorney and taxed as a part of the cost of the proceeding shall bear interest at a like rate from the day of entry.

Section 8-8-10, *Code of Alabama* 1975.

* * * * *

Stay or Injunction Pending Appeal

(a) *Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals.* Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. . . .

(b) *Stay May be Conditioned Upon Giving of Bond; Proceedings Against Sureties.* Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court.

Federal Rules of Appellate Procedure 8.

* * * * *

Damages for Delay.

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Federal Rules of Appellate Procedure, Rule 38.

* * * * *

Damages for Frivolous Appeal.

> In civil cases, if the appellate court shall determine on motion or ex mero motu that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Alabama Rules of Appellate Procedure, Rule 38.

* * * * *

Stay or Injunction Pending Appeal.

> (a) *Stay by Supersedeas Bond.* The appellant shall not be entitled to a stay of execution of the judgment pending appeal (except as provided in Title 7, § 799, Code, and ARCP Rule 62(e)) unless he executes bond with good and sufficient sureties, approved by the clerk of the trial court, payable to appellee (or to the clerk or register if the trial court so directs), with condition, failing the appeal, to satisfy such judgment as the appellate court may render, when the judgment is:
>
> > (1) For the payment of money only, in an amount equal to 150% of the amount of the judgment if the judgment does not exceed $10,000.00; or 125% if the judgment exceeds $10,000.00; . . .

Alabama Rules of Appellate Procedure, Rule 8.

STATEMENT OF THE CASE

Alan Woods and Cara Woods brought suit on October 15, 1982 in the Tenth Judicial Circuit of Alabama, Bessemer Division, against the Burlington Northern Railroad Company (hereinafter "Burlington Northern") and others to recover damages for injuries sustained in a motorcycle accident. The case was removed to the United States District Court for the Northern District of Alabama on November 15, 1982. On

December 28, 1982, plaintiffs deleted the other defendants, and Burlington Northern was the sole remaining defendant.

The case was tried in January 1984, and the jury returned a verdict of $300,000.00 in favor of Alan Woods and $5,000.00 in favor of Cara Woods. Judgment was entered based on the jury verdict on January 13, 1984. Burlington Northern filed a motion for judgment notwithstanding the verdict or, in the alternative, for new trial on January 23, 1984. This motion was overruled on June 29, 1985.

On July 24, 1985, Burlington Northern filed a Notice of Appeal in the district court along with a Bond for Costs on Appeal and Supersedeas Bond. Under the terms of the Bond, the plaintiffs were guaranteed by the bonding company that the judgment, interest and costs of judgment and appeal would be paid. On August 16, 1985, the court of appeals affirmed the judgment of the trial court. (Appendix D).

On August 22, 1985, the plaintiffs-appellees filed a motion for assessment of statutory penalty seeking to recover a penalty of ten percent of the judgment pursuant to Alabama Code Section 12-22-72. (Appendix B). Burlington Northern responded to this motion on August 30, 1985. (Appendix C). The response contended that the Alabama affirmance penalty was unconstitutional under both the Equal Protection Clause and the Due Process Clause and that it is a procedural rule and is inapplicable in federal court.[1] The issue of the validation of the Alabama affirmance penalty was not ripe until the affirmance by the appellate court on August 16, 1985. Thus, the issue was timely raised at the appellate level.

Appellees' motion for statutory penalty was granted on September 19, 1985. (Appendix A).

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[1] Additionally, the response noted that the judgment was not final at the time of appellees' motion. The Eleventh Circuit subsequently denied appellant's Petition for Panel Rehearing thus mooting the issue of timeliness.

Petitioner now prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Eleventh Circuit.[2]

REASONS FOR GRANTING THE WRIT

Alabama law provides that a penalty of ten percent of the judgment is to be assessed against defendant-appellants who stay their judgment through a supersedeas bond and lose on appeal. The penalty is non-discretionary and applies whether the appeal is substantial or frivolous. A partial reversal obliterates the penalty. Because it is tied to the amount of judgment, the penalty is increased when the judgment is higher, even though a larger judgment would presumably increase the legal and economic need for appeal. It applies only to judgments where awards have been made in favor of the plaintiff. There is no similar penalty when judgments on behalf of the defendant are affirmed. This Alabama affirmance penalty, codified in Section 12-22-72 of the *Code of Alabama* (1975), has been justified under Alabama law as intending to discourage frivolous appeals. *See, e.g. Chapman v. Rivers Construction Company,* 284 Ala. 633, 227 So.2d 403 (1969); *Montgomery Light & Water Power Company v. Thombs,* 204 Ala. 678, 87 So. 205 (1920). And as providing the successful appellee with additional damages when the right to execute is interrupted by a supersedeas bond. *City of Birmingham v. Bowen,* 254 Ala. 41, 47, 47 So.2d 174, 180 (1956).

Petitioner submits that § 12-22-72 is unconstitutional (i) as a violation of the equal protection clause of Fourteenth Amendment and (ii) as a violation of the due process clause of the Fourteenth Amendment of the United States Constitution. Peti-

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[2] The aspects of the judgment pertaining to the merits of the underlying claim are not before the Court. In fact, Burlington Northern has satisfied the judgment with the exception of the $30,500 assessed as an affirmance penalty.

tioner further contends that the Eleventh Circuit erred in applying the Alabama affirmance penalty because of the violation of the constitutional principles enunciated in *Hanna v. Plumer,* 380 U.S. 460 (1965).

1. **The statutory affirmance penalty violates the equal protection clause.**

Any defendant which loses a money judgment must file a supersedeas bond to delay payment of the judgment until the case is fully resolved. Additionally twelve percent per annum interest must be paid on any portion of the judgment which remains extant after conclusion of the appeal process. Ala. Code § 8-8-10 (1975). If the appeal is deemed frivolous by the appellate court, an additional penalty may be assessed by the appellate court. The Alabama affirmance penalty imposes an additional non-discretional liability of ten percent of the judgment if it is ultimately affirmed regardless of the merits of the appeal.

Rules which affect access to appellate courts, such as the one involved here, must be "reasonably tailored to achieve" those ends and "uniformly and nondiscriminatorily applied." *Lindsey v. Normet,* 405 U.S. 56, 78 (1972). We submit that the Alabama affirmance penalty fails to meet that test.

The Alabama affirmance penalty serves no defined purposes.

First, the Alabama affirmance penalty fails to be reasonably tailored to serving as a deterrent to frivolous appeals. It provides no penalty against plaintiffs or losing parties in litigation involving non-monetary awards who file unsubstantial appeals. On the other hand, the statute mandates an assessment against all losing defendant appellants regardless of the substantiality or good faith of their appeal. Indeed, the affirmance penalty is a redundant appendage. The Alabama rules of appellate procedure authorizes the appellate court to assess damages for frivolous appeals.[3] Presumably, the fact that no damages are

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[3] Ala. R. of Appellate Pro. 38.

assessed under the appropriate rule (as the case here) would indicate that the ten per cent affirmance penalty is being applied in a case where the appellate court did not find the appeal to be frivolous.

Second, it adds no protection to a plaintiff's litigated property. The supersedeas bond guarantees recovery of the judgment interest and appellate costs before a judgment may be stayed pending appeal. Moreover, the twelve per cent interest per annum from the date of entry to the date it is ultimately paid guarantees reimbursement for the time cost of the delay.[4] Therefore, the statutory penalty is just as it is described—a penalty.

Therefore the Alabama affirmance penalty is both over-inclusive and under-inclusive. In light of the foregoing, we submit that the Alabama affirmance penalty is arbitrary and irrational and violates the Equal Protection Clause.

2. **The statute deprives a defendant of property without due process of law.**

The Alabama affirmance penalty also runs afoul of the Due Process Clause. Imposition of the affirmance penalty is mandatory. There is no provision for an opportunity to rebut the statutory presumptions.[5]

When property is taken by government action, the dictates of due process are determined by balancing three factors: first, the private interest that will be affected; second, the risk of er-

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[4] Ala. Code § 8-8-10 (1975).

[5] The Supreme Court many years ago held that the imposition of a penalty for filing a supersedeas bond does not violate due process principles. *Louisville & N. R. Co. v. Stewart*, 241 U.S. 261 (1916). We contend that modern principles of due process discussed *infra* call into question the continued validity of *Stewart*.

roneous deprivation of that interest under the procedural design of the statute; and third, the interest of the government including the legislative objective and the burden that an alternative procedure would entail. *Mathews v. Eldridge,* 424 U.S. 319, 355 (1976); Comment, *Mandatory 10-Percent Penalty on Unsuccessful Appeals of Money Judgments in Alabama—Constitutional and Policy Considerations,* 32 *Ala. L. Rev.* 197, 217 (1980).

The statute affects a substantial private interest. Petitioner in this case stands to incur an additional obligation of $30,500 as a result of the affirmance penalty. Furthermore, every defendant filing an appeal in Alabama must first weigh the possibility of a ten percent add-on imposed under the legislation. Clearly, the statute affects a private property interest.

Moreover, the error in the statutory design is inherent. The statute necessarily entertains erroneous but irrebuttable presumptions. First, the statute presumes that all appellants who lose on appeal bring unmeritorious appeals. Second, the statute presumes that an appeal from a larger verdict is more frivolous than a small one. Common experience suggests that indeed the reverse is true. For example, it would be hard to suggest that Texaco would be acting frivolously to appeal the *Pennzoil* verdict. Under Alabama law Texaco would be required to place over one billion dollars at risk for the privilege of review. Additionally, the act presumes that a plaintiff's litigated property is somehow at risk after a defendant executes a supersedeas bond with surety. These presumptions are completely irrational and arbitrary and cannot be reasonably defended under any circumstances.

This Court has looked with disfavor on irrebuttable presumptions arising out of state statutes. See e.g. *Cleveland Board of Education v. La Fleur,* 414 U.S. 632 (1974). In that case, the Court held that any such irrebuttable presumption is forbidden "when that presumption is not necessarily or universally true in

fact, and when the state has reasonable alternative means of making the crucial determination." *Id.*, at 645.

When penalties are enforced by a state, due process requires that there be some relationship between the penalty and the action sought to be deterred by the penalty. Simply put, there must be some evidence that an appeal is in fact frivolous before a penalty for filing a frivolous appeal can be assessed. Compare *Thompson v. Louisville,* 362 U.S. 199 (1960). Thus, the Alabama affirmance penalty is wrongfully applied because (1) it provides no reasonable means for determining whether an appeal is frivolous and (2) there is not even an allegation much less any evidence that the appeal brought by Petitioner in this case was frivolous.

3. The affirmance penalty should not be applied by federal courts.

The Federal Rules of Appellate Procedure completely control the handling of appeals in the United States Court of Appeals. Thus, the rules permit the court to stay execution of judgments and to require a supersedeas bond during such stay. Fed. R. App. P. 8. Interest accrues on judgments from the date of entry. 28 U.S.C. § 1961; Fed. R. App. P. 37. The Court of Appeals is permitted to assess damages when an appeal is frivolous. Fed. R. App. P. 38. This Court has ordered that these Appellate rules "shall govern *all proceedings* in appeals . . . thereafter brought . . ." Order of the United States Supreme Court, December 4, 1967. (emphasis added). Consequently, it is federal law which governs the procedure for appeals brought in federal court.

Appellate procedure in state court is analogous, though different in some particulars. See Ala. R. App. P. 8, 37, 38; *Code of Ala.* § 12-22-72 (1975). In the federal court the amount needed to secure a supersedeas bond is discretionary with the court, but in the state court it is mandatory. The amount of bond in the federal appeal is set by the court. The amount is fixed at

125% of the judgment in state courts. Interest on federal judgments is tied to treasury bills, while the rate in state courts is set at 12%. And of course, the Federal defendant is not subject to an affirmance penalty, but the state court defendant is.

Throughout the course of this appeal, the federal courts utilized federal rules to determine the applicable procedure. Thus, the federal time-table was followed by the parties. When seeking a stay of the judgment, petitioner followed the requirements of Rule 8 of the Federal Rules of Appellate Procedure. The imposition of the Alabama affirmance penalty was thus an aberration imposed by the Eleventh Circuit.

Petitioner maintains that the Federal Appellate rules, which are declared by order of this court to be controlling, should be applied, and that the state court rules have no field of operation. *Hanna v. Plumer,* 380 U.S. 460 (1965) held that when there is a controlling federal "rule it shall be enforced, provided the rule really regulates procedure." *Hanna v. Plumer, supra* at 464, quoting *Sibbach v. Wilson & Co.,* 312 U.S. 1, 14 (1940).

Even assuming that the Alabama affirmance penalty is not within the scope of the Federal Appellate rules, the state rule should not be applied. The *Hanna* opinion made clear that the interest protected in *Erie Railroad Co. v. Thompkins,* 304 U.S. 64 (1938) dealt with "a realization that it would be unfair for the character or result of litigation materially to differ because the suit had been brought in a federal court." *Id.* at 467. More specifically *Erie* struck down a "general law" which had arisen out of the progeny of *Swift v. Tyson,* 16 Pet. 1 (U.S. 1842). There is of course no "general law" in this case, because the Appellate rules and federal statutes control. There is no change in the character or result of the litigation, which was already determined on the merits in this case before the penalty was imposed. It is ironic that the Alabama affirmance penalty appears in the Title of the Alabama Code entitled "Appellate Proceedings". The Alabama Legislature at least regarded the penalty as a procedural matter, yet the Eleventh Circuit Court of Appeals failed to follow that legislative intent.

4. **The issue is already before the Court.**

The question of whether the affirmance penalty is unconstitutional is before the Supreme Court in the case of *Aetna Life Insurance Co. v. Lavoie,* 53 U.S.L.W. 3847 (No. 84-1601, June 4, 1985), an appeal from the Alabama Supreme Court. *Lavoie* does not raise the issue of whether the affirmance penalty should be applied in federal court. Additionally, *Lavoie* contains possible grounds for reversal which may moot the affirmance penalty issue. Therefore, this petition is the more appropriate vehicle for disposing of the affirmance penalty question.

CONCLUSION

The Alabama affirmance penalty was enacted during the middle of the 19th century at a time when all states were attempting to severely restrict access to appellate courts. Since that time, beliefs concerning the appropriate role of courts in society have drastically changed. With the advent of the Fourteenth Amendment and the accompanying realization in modern time of its scope, the validity of the affirmance penalty is completely undermined. Therefore, we respectfully request that this petition be granted for the purpose of invalidating the Alabama affirmance penalty.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7510

Alan Woods and
Cara Woods,
Plaintiffs-Appellees,

vs.

Burlington Northern
Railroad Company, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the
Northern District of Alabama

Before VANCE and JOHNSON, Circuit Judges, and MORAN, Senior Circuit Judge.

BY THE COURT:

Appellees' motion for 10% penalty assessment pursuant to Alabama Statute is GRANTED.

Filed September 19, 1985.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 84-7510

Alan Woods and Cara Woods,
Plaintiffs-Appellees,

vs.

Burlington Northern
Railroad Company, et al.,
Defendants-Appellants.

MOTION FOR ASSESSMENT OF STATUTORY PENALTY

COME the Plaintiffs-Appellees in the above-styled cause, by and through their attorneys of record, and state unto this Honorable Court as follows:

1. Your movant was the verdict-winner below having obtained a verdict on which final judgment was entered in the amount of $305,000. Said judgment was stayed on appeal by the execution of bond with surety on behalf of Burlington Northern Railroad Company, a corporation, the Defendants-Appellants. (See Exhibit 1 attached.)

2. This Court affirmed the judgment of the court below and the twenty-day period for the filing of a petition for rehearing and/or suggestion of en banc consideration has lapsed on, to-wit: September 5, 1985. No petition for rehearing or suggestion for an en banc consideration has been filed on behalf of Defendants-Appellants.

3. The provisions of Tit. 12, *Code of Alabama,* § 12-22-72 (1975), are applicable. (See Exhibit 2 attached hereto). See *Proctor v. Gissendaner,* 587 F.2d 182 (5th Cir., Ala. 1979). (See Exhibit 3 attached hereto). Also, see *Standridge Tractor & Imple-*

ment Company v. Auto-Owners Insurance Company, a corporation, Eleventh Circuit Court of Appeals, Case No. 81-7100. (See Exhibit 4 attached hereto.)

4. We are informed and believe that both under the wording of the Alabama statute and in accordance with the practice that prevails in the Alabama courts, the statutorily mandated penalty is to be assessed by or in the Appellate Court - separate and apart from any interest and/or costs to which the Appellee is or may be entitled in either the Appellate or District Court.

WHEREFORE, PREMISES CONSIDERED, your Movant respectfully requests this Honorable Court to enter an order directing the Clerk of the Eleventh Circuit Court of Appeals to assess the statutorily mandated penalty of ten percent (10%) of the amount of the affirmed judgment.

Respectfully submitted,

HARE, WYNN, NEWELL & NEWTON

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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 84-7510

Alan Woods and Cara Woods,
Plaintiffs-Appellees

vs.

Burlington Northern
Railroad Company, et al.,
Defendants-Appellants

RESPONSE TO APPELLEE'S MOTION FOR ASSESSMENT OF STATUTORY PENALTY

Comes now Burlington Northern Railroad Company, Defendant-Appellant in the above-referenced case, and says as follows in response to Plaintiffs-Appellees' Motion for Assessment of Statutory Penalty:

1. The statutory penalty cannot be assessed at this time because the judgment of the Court of Appeals is not final. Contrary to the assertions of the appellees, the time for the filing of a petition for rehearing has not lapsed. The appellant will file a petition for rehearing on or before September 5, 1985, the final date for filing.

2. *Alabama Code* § 12-22-72 (1975), which enacts the statutory affirmance penalty, is violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

3. The Alabama statutory affirmance penalty is violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

4. The Alabama statutory affirmance fee is a procedural rule and is inapplicable in federal court under the doctrine of *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938) and its progeny.

WE RESPECTFULLY REQUEST ORAL ARGUMENT

/s/ Kenneth D. Davis
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APPENDIX D

United States Court of Appeals,
Eleventh Circuit.

No. 84-7510.

Alan Woods and Cara Woods,
Plaintiffs-Appellees,

v.

Burlington Northern
Railroad Company, et al.,
Defendants-Appellants.

Aug. 16, 1985.

Appeal from the United States District Court for the Northern District of Alabama.

Before VANCE and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

Plaintiffs were injured when the motorcycle on which they were riding overturned. The accident occurred in Pensacola, Florida on Main Street near its intersection with Comandencia. Defendant Burlington's track runs up the center of Main Street at that location. Plaintiffs alleged that the accident was caused by a dangerous defect in the surface of Main Street and that the defect was created and controlled by Burlington. Trial by jury resulted in substantial verdicts and judgments in plaintiffs' favor. Burlington appeals and makes four contentions of error.

(1)

Burlington first argues that the trial court did not enforce its pretrial order in an even handed manner. In pertinent part, the order provides:

10. *Exhibits.* The parties shall by October 14, 1983, exchange lists describing all writings, recordings, documents, bills, reports, records, photographs and other exhibits (collectively called "exhibits") which they may utilize at trial. Unless specifically agreed between the parties or allowed by the court for good cause shown, the parties shall be precluded from offering as substantive evidence any exhibit not so identified. Except where beyond a party's control or otherwise impracticable (e.g., records from an independent third-party being obtained through subpoena), each party shall make such exhibits available for inspection and copying. Except to the extent written notice to the contrary is filed with the Clerk of the Court within five days after receiving such list, each party shall be deemed to have agreed (for purposes of this litigation only):

. . . .

(g) that each of the listed documents is admissible at trial.

No lists were exhanged. Instead, the parties exchanged the actual exhibits that they proposed to use. No written notices or objections to opposing parties' exhibits were filed with the clerk of the court by either side.

Before the jury was struck the following colloquy took place:

THE COURT: Are there any other preliminary matters? I take it you've exchanged a list of witnesses. Have you exchanged a list of documents?

MR. STABLER [Burlington's attorney]: I guess we have, haven't we?

THE COURT: Well, since I have heard nothing by way of objection to documents, any document that's offered will be received in evidence.

MR. CARLTON WYNN [Plaintiffs' attorney]: We've given you a master sheet on all of the exhibits that we would be talking about and still that—and plus, I think I've shown you every picture that I had and I think—

MR. STABLER: We have exchanged information very freely, I believe.

THE COURT: All right.

Notwithstanding the apparent agreement of the parties and the absence of any pre-trial objections by any party the following developed during plaintiffs' examination of their first witness:

MR. WYNN: I offer that as plaintiffs' exhibit number five.

MR. STABLER: Your Honor, I'm going to object to this.

THE COURT: Let me ask you this, Mr. Stabler, was this one of the exhibits listed?

MR. STABLER: We've seen it and objected to it before.

THE COURT: Have you objected to it?

MR. STABLER: Objected to it in the deposition, Your Honor.

THE COURT: Well, the pretrial order required you before the receipt of the list of the exhibits to file an objection with the Court, and it further provided that if no objections were filed with the Court, the exhibit when offered at trial would be received in evidence.

MR. STABLER: Your Honor, I don't want to make a point of it. I didn't receive a list of the exhibits in that form, but I was made aware they were going to offer them and I have been made aware—

MR. WYNN: He has said, and I represent to the Court he has seen every picture I have in my file.

MR. STABLER: I'm not making a point of that, but I was not given a formal list for the proceedings we're talking about here. I'm not making a point of it, Carlton, but I'm explaining why I didn't give a formal response.

MR. WYNN: They gave the pictures themselves, I don't see how they could be any more accurate than that, if they are talking about numbers a picture might have—

THE COURT: Well, does either side or did either side comply with the pretrial order in providing a list of documents?

MR. WYNN: We did, and he showed me his and I showed him mine.

MR. STABLER: I don't believe you gave me a list.

MR. WYNN: When I showed you the pictures.

MR. STABLER: I agree with you. That's what I am telling the Court. I agree with you.

MR. WYNN: I don't know how else I could give you a better list than the pictures themselves. I didn't say it with regard to these pictures—they are numbered one through fifty—number one—this is number twenty-five, gave everything in my file, gave it to you and said this is what we expect you to use in this case.

THE COURT: All right. The objection is overruled.

Q. All right sir.

MR. STABLER: Your Honor, you realize he is talking about pictures of another area than in this case, an area he says is comparable to the area in this case?

> THE COURT: All I realize is I signed a pretrial order that required that objections to exhibits be filed with the Court prior to trial, so I could pass on them prior to trial and no objections have been filed with the Court and, as I said to ya'll on the record this morning the exhibits which have been identified when offered will be received in evidence because there has been no objection.

The thrust of Burlington's contention is that by enforcing a portion of its pretrial order (the requirement that written objections be filed in advance of trial) and waiving another (the exchanging of lists of exhibits), the district court unfairly allowed into evidence inadmissible exhibits[1] that were highly prejudicial.

As we will briefly note in part 2 *infra,* we conclude that the exhibits were admissible. Even if we concluded to the contrary, however, we would not accept that the trial court's handling of the matter was unfair or erroneous.

This court has recognized that trial courts have wide latitude in controlling pre-trial procedures. Enforcement of pretrial orders in matters such as the one now before the court is within the discretion of the district court. *See Typographical Service, Inc. v. Itek Corp.,* 721 F.2d 1317, 1319 (11th Cir.1983); *Fabrica Italiana Lavorazione Materie Organiche, S.A.S. v. Kaiser Aluminum & Chemical Corp.,* 684 F.2d 776, 780-81 (11th Cir.1982); *National Distillers & Chemical Co. v. Brad's Machine Products,* 666 F.2d 492, 497 (11th Cir.1982). The trial judge's rulings in this area "must not be disturbed unless it is demonstrated that he has clearly abused the broad discretion vested in him by Rule 16." *National Distillers,* 666 F.2d at 497 (quoting *Davis v. Duplantis,* 448 F.2d 918, 921 (5th Cir. 1971)).

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[1] The exhibits about which Burlington complains are not specifically identified in its brief. We assume, as did the writer of appellees' brief, that they were five photographs of Main Street and a letter dated April 8, 1981, from the Pensacola Streets/Traffic Superintendent to Burlington.

In this case the trial court treated the parties' exchange of the actual exhibits as substantial compliance with the pre-trial order's requirement that lists of the exhibits be exchanged. It allowed into evidence the exchanged exhibits and did not allow the plaintiffs to introduce exhibits that had not been exchanged.

Compliance with prescribed pretrial procedures is of increasing importance to the effective administration of justice in the face of burgeoning case loads. Trial judges and opposing litigants have a right to expect that the court's orders will be carefully followed in order that the business of the court may be handled expeditiously and fairly. Appellate courts are empowered, of course, to provide relief from arbitrary and unreasonable application of rules. Such, however, is not the case before us. This was a reasonable requirement with an obvious and important purpose, which in our view was applied in a reasonable manner. Counsel cannot show cavalier disregard for a district court's pre-trial requirements and reasonably expect this court to extricate them from an unhappy aftermath.

(2)

Burlington next argues that the district court erred in admitting the exhibits[2] into evidence and in allowing a defense witness to be impeached with questions concerning other accidents that allegedly occurred in the same vicinity. In connection with the exhibits, there is an overlap between this contention and the first. Our ruling with respect to the first contention disposes of the second. It is appropriate to note, however, that in our view the exhibits were both relevant and admissible. Plaintiffs' theory, which had ample evidentiary support, was that Burlington had allowed the condition of the surface of Main Street to deteriorate all along the three blocks that its tracks ran onto and up the center of the street. Burlington disputed this

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[2] For purposes of our decision we assume that Burlington properly preserved the claimed errors.

generalized state of deterioration. The photographs simply show the condition of the street in that area. The letter, which was supplemented by the testimony of the street superintendent, showed that he complained to the railroad about the street condition over a year before the accident.

The admissibility of evidence is another aspect of a trial that is committed to the discretion of the trial court. The trial court should be reversed only when appellant can show that it abused its broad discretion and that the ruling adversely affected appellant's substantial rights. *Murphy v. City of Flagler Beach,* 761 F.2d 622, 626 (11th Cir.1985); *Pesaplastic, C.A. v. Cincinnati Milacron Co.,* 750 F.2d 1516, 1524 (11th Cir.1985); *Loughan v. Firestone Tire & Rubber Co.,* 749 F.2d 1519, 1521, 1524 (11th Cir.1985). Even aside from Burlington's noncompliance with the pretrial order, we would reject a contention that the district court abused its discretion in admitting this evidence because the exhibits fairly supported plaintiffs' case and were relevant to the issues in controversy.

Burlington next complains that the trial court abused its discretion by allowing plaintiffs' counsel to cross-examine a defense witness with questions concerning other accidents. Burlington does not identify the particular ruling on which its complaint is based. From our reading of the transcript, however, we find that defendant's roadmaster, Padley, testified that he inspected the track in Pensacola about once a month. He testified on direct examination about the condition of the track and street in the area where the accident occurred and indicated that it was safe for traffic. He was questioned about the photographic exhibits without any limitations as to a precise area. On cross examination, he denied that the track was in a hazardous condition in August 1982. He was then asked whether he was familiar with other specific accidents that had occurred shortly before or shortly after plaintiffs' accident. The questions concerned accidents that were said to have occurred at locations in Main Street along the Burlington track but not at

the precise location where plaintiffs were injured. The witness denied any knowledge of the accidents, and no other evidence concerning them was introduced.

A fair interpretation of the witnesses' direct testimony was that the Burlington track in this area was maintained in a condition that was not hazardous. It was not an abuse of discretion to allow, as impeachment, questions concerning other accidents that were said to have occurred at about the same time and within the same area.

(3)

Burlington complains about several statements made by opposing counsel in closing argument. We have reviewed each of the claims in context and have determined that reversible error has not been demonstrated.

One statement by plaintiffs' counsel, however, deserves specific attention: "[I]t's improper for us to say, put yourself in the shoes of the plaintiff. . . ." This is substantially the same variation of the "golden rule" argument that was condemned by the fifth circuit in *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 496-97 (5th Cir.1982). The straight golden rule argument—"put yourself in the shoes of my client,"—clearly has been banned by binding precedent. *See Burrage v. Harrell,* 537 F.2d 837, 839 (5th Cir.1976); *Har-Pen Truck Lines, Inc. v. Mills,* 378 F.2d 705, 714-15 (5th Cir.1967). This reversed version is calculated to evoke precisely the same improper emotional response. If made by the prevailing party this improper argument ordinarily will result in reversal. It does not in this case only because Burlington did not object to it.

Our general rule is that a timely objection is necessary to bring to the trial court's attention alleged errors in the conduct of a trial. *Jenkins v. General Motors Corp.*, 446 F.2d 377, 382-83 (5th Cir.1971), *cert. denied,* 405 U.S. 922, 92 S.Ct. 959, 30 L.Ed.2d 793 (1972). The rule is applied to argument of counsel,

even argument found to be inflammatory, prejudicial and improper. *Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662, 666-67 (5th Cir.1967). The rule is grounded on sound policy. First, the requirement fosters judicial economy. By bringing an error to the trial judge's attention, the court has a chance to correct it on the spot. Requiring timely objection prohibits counsel from "sandbagging" the court by remaining silent and then, if the result is unsatisfactory, claiming error. *See Sanders v. Chatham County Board of Commissioners*, 728 F.2d 1367, 1368 (11th Cir.1984). Second, there are a number of good reasons why skilled trial counsel may make a tactical decision not to object to improper argument: (1) an argument that looks highly improper in a cold record may strike counsel as being wholly lacking in effect; (2) because of the "chemistry" of the courtroom counsel may think that the improper argument may offend and in effect backfire; and (3) the improper argument may open the door to a response that will be of more value than a sustained objection.

We retain the authority to review for plain error but exercise of that authority is seldom justified in reviewing argument of counsel in a civil case. We conclude it is not justified here.

(4)

Burlington finally contends that the verdict is so excessive as to "shock the judicial conscience," the standard reaffirmed by this court in *Jackson v. Magnolia Brokerage Co.*, 742 F.2d 1305, 1306-07 (11th Cir.1984). The jury could have found from the evidence that plaintiff Alan Woods sustained painful and serious injuries, that required two surgical operations, that resulted in permanent pain and disability and that will result in a permanent reduction in earnings. Our system guarantees that, when demanded, evaluation of the damages of a prevailing party will be by a jury. Under all of the circumstances in this case the generosity of the jury's verdict may be surprising. A surprisingly large verdict, however, is not sufficient justification for an

appellate court's substitution of its evaluation of plaintiffs' damages for that of a jury. The verdict was not so out of proportion to the injuries sustained by the plaintiff as to shock the judicial conscience.

AFFIRMED.